

FILED

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ALEXANDER L. STEVAS,
CLERK

82 - 2097

No.

LUIGI MARRE LAND AND CATTLE COMPANY,
Petitioner

v.

PACIFIC GAS AND ELECTRIC COMPANY,
and JOHN F. READY, Trustee in Bankruptcy,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY MICHAEL GLASSMAN
DAVID R. HINDEN
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ATTORNEYS FOR PETITIONER

QUESTION FOR REVIEW

Whether Petitioner in the bankruptcy proceeding below was denied due process of law by the wholesale admission of trial testimony and exhibits from a state court proceeding absent an appropriate foundation as to the admissibility of such evidence.

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OPINIONS BELOW

The United States Bankruptcy Court for the Central District of California determined that the trustee in bankruptcy properly assigned certain leasehold interests to Pacific Gas and Electric Company. Its decision was entered on May 12, 1980.

The United States District Court for the Central District of California entered orders affirming the judgment of the bankruptcy court on February 4, 1982. Its memorandum opinions (No. CV-80-3124-LTL and 80-3125-LTL) were not reported.

The Court of Appeals for the Ninth Circuit affirmed those orders on January 24, 1983 in a consolidated opinion (Nos. 82-5224 and 82-5223), a copy of which is attached as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1983. The United States Supreme Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

The following constitutional provision is involved in this case:

"[N]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." [United States Constitution, Amendment V.]

STATEMENT OF THE CASE

The Luigi Marre Land & Cattle Company ("Cattle Company") owns fee title to approximately 7,000 acres of realty, including approximately seven miles of ocean-front property, located along the central coast of California. This property ("the Marre Ranch") has been owned by the Marre family, or entities controlled by them, since the nineteenth century.

Cattle Company has owned a fee interest in the property since 1914. During the mid-1960's, Pacific Gas & Electric Company ("PG&E") entered into negotiations with Cattle Company to acquire a 580-acre portion of the Marre Ranch to construct the Diablo Canyon Nuclear Power Plant.

The agreement ultimately worked out provided that Cattle Company would lease a substantial portion of the Marre Ranch to two family-owned companies, San Luis Obispo Bay Properties, Inc. ("Properties") and Diablo Canyon Corporation ("Diablo Canyon"). Properties simultaneously subleased a 580-acre parcel to

PG&E^{1/} as well as various rights of way. The leases between Cattle Company, Properties and Diablo Canyon terminate in the year 2067 with a 99-year option to renew.

Under the agreement, PG&E did not pay for the land or pay any rent. Instead, it guaranteed a line of credit to Properties which was secured by a consensual lien on the remaining portion of the Properties lease with Cattle Company. This lien covered a seven-mile stretch of the Marre Ranch (Parcel L) which began at the Pacific shoreline and extended approximately 2,000 feet inland throughout its length.

Properties thereupon borrowed money under PG&E's guarantee. In 1970, Properties defaulted and PG&E paid approximately \$8.9 million on its guarantee. All events in this case and a related state court action arise out of PG&E's payment on this obligation.

1/ This parcel currently is the site of the Diablo Canyon Nuclear Power Plant.

2/

In the state court action, PG&E filed against Properties in 1971 to foreclose its lien on Parcel L and to recover money paid on its guarantee. In 1974, PG&E filed an amended complaint against Cattle Company, Properties, Diablo Canyon and other Marre entities on an alter ego theory. The state action was temporarily stayed by Chapter 11 petitions filed by Properties and Diablo Canyon.

Properties and Diablo Canyon were adjudicated bankrupt in 1977. Later that year, PG&E and the trustee in bankruptcy ("trustee") entered into a settlement agreement. That agreement provided, inter alia, that the stay in the state court action would be lifted and that the trustee would assign the Properties and Diablo Canyon leases to PG&E.

The state court action was tried in 1979, and the bankruptcy proceeding (which determined

2/ Pacific Gas & Electric Company v. San Luis Obispo Properties, et al., San Luis Obispo County Superior Court, No. 3930. This matter currently is pending appeal in the California Court of Appeal.

the validity of the leasehold assignments) was tried in 1980.

In the state action PG&E sought, inter alia, imposition of an equitable lien upon all of Cattle Company's realty. At trial in the state court PG&E succeeded in proving an alter ego relationship among Cattle Company, Properties, Diablo Canyon and various other entities and individuals. By its judgment the state court held that PG&E had an equitable lien in Cattle Company's real property which secured the guarantee on Properties' line of credit.

In the instant bankruptcy action, PG&E proffered as direct evidence, and the bankruptcy court admitted, voluminous evidence admitted in the state action. These consisted of transcripts of Robert Marre's testimony and state court exhibits. The bankruptcy court apparently did so in deference to PG&E's theory that, if a "close connection" existed among Diablo Canyon, Properties, Cattle Company, Robert Marre and others, it would be inequitable: (1) to allow Cattle Company to claim termination of the Cattle Company-Diablo and Cattle Company-Properties

leases; and (2) not to subordinate Cattle Company's claims for rent owing from the bankrupts, inasmuch as the same constituted "insider's" claims.

The bankruptcy court admitted the subject evidence under Rule 32(2)(2), Federal Rules of Civil Procedure. In its Memorandum of Decision it wrote: "Use of the transcript [of Robert Marre's testimony] was permitted in the manner that a deposition of an adverse party is permitted. . . ."

Rule 32(a)(2), Federal Rules of Civil Procedure, provides:

"The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose."

[Emphasis added.]

On its face, Rule 32(a)(2) clearly provides that depositions, not some other form of prior testimony, may be used at trial if the other requirements of the Rule are satisfied. There is no authority for the proposition that, in contemplation of Rule 32(a)(2), prior trial testimony is tantamount to deposition testimony and may be used interchangeably with the latter. On the contrary, case law uniformly applies Rules 32(a)(2) to the use of depositions by adverse parties. See generally, 8 Wright and Miller, Federal Practice and Procedure, §§2141, et seq. (1970).

The bankruptcy court thus erred in ruling that Rule 32(a)(2) authorized the admission of state trial court evidence. The District Court affirmed the bankruptcy decision. The Court of Appeals affirmed the decision of the District Court but relied upon Federal Rule of Evidence, Rule 801(d)(2)(D).

Rule 801(d)(2)(D) provides:

"A statement is not hearsay if . . .
the statement is offered against a

party and is . . . a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship. . . ."

Before evidence may be admitted under this Rule, its proponent must lay the proper foundation. Zenith Radio Corp. v. Matsushita Electric Industrial Company, 505 F.Supp. 1190, 1247 (E.D. Pa. 1980), reversed on other grounds, 631 F.2d 1069 (3rd Cir. 1980). Such a showing requires that declarant acted as the party's agent and that the statement concerned a matter within the scope of his agency. Id., at 1247. Accord: Mahlandt v. Wild Canid Survival & Research Center, Inc., 588 F.2d 626 (8th Cir. 1978).

Respondent laid no such foundation, either prior to or subsequent to offering the transcripts of Marre's state court testimony. The only showing was that Marre was an officer of Cattle Company. That did not suffice.

The evidence in question formed the linchpin of Respondent's showing that the Marre family members and entities were alter egos of one

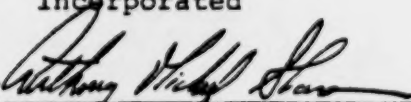
another. This issue was the crucial factor upon which the decision of the bankruptcy court was predicated.

CONCLUSION

Based upon the foregoing points and authorities, it is respectfully requested that the Court grant this petition for a writ of certiorari.

Respectfully submitted,

GLASSMAN & BROWNING
Incorporated

By 

ANTHONY MICHAEL GLASSMAN
DAVID R. HINDEN

PROOF OF SERVICE

I, ANTHONY MICHAEL GLASSMAN, am a member of the Bar of the Supreme Court of the United States and am a shareholder in the firm of Glassman & Browning, Incorporated.

I hereby certify that on the 19th day of April 1983, I served the Petition for Writ of Certiorari as follows:

1. On Pacific Gas & Electric Company, by mailing three copies in a duly addressed envelope, with first-class postage prepaid to Charles T. Van Deusen, Esquire and Arthur L. Hillman, Jr., Esquire, 77 Beale Street, 31st Floor, San Francisco, CA 94106.

2. On John F. Ready, Trustee, by mailing three copies in a duly addressed envelope, with first-class postage prepaid to David Y. Farmer, Esquire, 1305 Marsh Street, P.O. Box 1214, San Luis Obispo, CA 93406.

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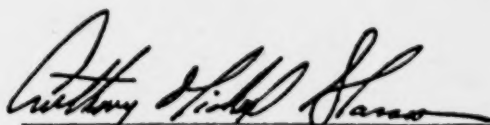
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It is further certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

A handwritten signature in cursive script, appearing to read "Anthony Michael Glassman", written over a horizontal line.

ANTHONY MICHAEL GLASSMAN
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